SUPREME COURT, U. S.

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FILED
JUN 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 212

CARLOS OVERTON,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI

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Opinions Below

The decision of the Court of Special Sessions is unreported and appears in the Record at pp. 214-16. It is set forth in the Appendix, *infra,* pp. 19-21. The opinion of the Appellate Term is reported at 51 Misc. 2d 140 (1966) and appears in the Record at p. 242. It is set forth in the Appendix, *infra,* p. 18. The opinion of the New York Court of Appeals is reported at 20 N. Y. 2d 360 (1967), and is set forth in the Appendix, *infra,* pp. 13-17.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 7, 1967 and the case remanded to the Appellate Term, which affirmed the conviction without opinion on March 22, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Questions Presented

1. Whether a school official consented to a police search of a student's locker where he acquiesced to the search only after being shown a seemingly valid search warrant.

2. Whether a school official has authority under the Fourth Amendment to consent to a police search of a high school student's locker and of the coat locked inside it.

Statement of the Case

On December 21, 1964 police officers came to Mount Vernon High School (R. 45, 100) with a search warrant authorizing them to search the school lockers and the cars owned by the parents of petitioner and of one Cabell, as well as petitioner's person, his apartment, and the grounds of the Mount Vernon High School, where petitioner and Cabell were both students (R. 9-10). The police were authorized to search for marijuana believed to be unlawfully possessed by petitioner (R. 9). The police showed the warrant to Dr. Adolph Panitz, the vice-principal (R. 57), who then led them to petitioner and Cabell, who were in the school lunchroom (R. 46). The police directed petitioner

and Cabell to come with them (R. 62, 63), and took them to the vice-principal's office (R. 64). In the office, petitioner was informed of the warrant and subjected to a search of his person, which yielded no evidence (R. 64, 66, 101, 115-117, 141-42). The police and the vice-principal then took petitioner (R. 47, 142) to the school locker assigned exclusively to him (R. 39, 77, 78, 92). The vice-principal opened the locker, which contained a coat (R. 78-79, 104). After petitioner, in response to a police question (R. 120), identified the coat as his own (R. 104, 120), one of the policemen removed it from the locker, searched through its pockets (R. 77-80, 120-121), and discovered four marijuana cigarettes (R. 104, 121).

The vice-principal's motives for cooperating in the search are not clear. At one point he asserted that "if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker" (R. 93). But he also made it clear that he was acquiescing to the authority of the search warrant. When questioned concerning his taking the police to petitioner (R. 58), going to the locker (R. 75), and opening it (R. 78), the vice-principal replied that he was honoring the search warrant (R. 75). The vice-principal also agreed that he "believed the search warrant was a valid and legal document" (R. 76).

Petitioner was charged with possession of marijuana (R. 4). The constitutional questions presented were raised by the petitioner in counsel's affirmation statement in support of the Motion to Suppress Evidence (R. 18). On March 19, 1965, after a hearing on suppression of the evidence, the Court of Special Sessions vacated the search warrant [as it had earlier ruled it would (R. 33-34)] be-

cause none of the affidavits in support of the warrant gave grounds to believe that there was any evidence in the school locker. Nevertheless, the Court denied the motion to suppress because the principal had "retained dominion over the use of the lockers" rendering "the search legal" (R. 215-216). Petitioner, who was 17 years old, thereupon pled guilty to an information charging him as a youthful offender and was sentenced to indeterminate probation (R. 227-229), which may run, at the discretion of the court, up to five years. On appeal the constitutional questions were raised again in petitioner's Affidavit of Errors (R. 230-239), and the Appellate Term, Second Department, reversed and dismissed the charge, holding that, "The search was illegal and cannot be justified upon the theory of consent on the part of the vice-principal . . . . Defendant had the exclusive use of the locker in question and the purported consent to search it was not binding upon him" (App., *infra,* p. 18). Thereupon the State appealed, and a divided New York Court of Appeals reversed the Appellate Term, holding that the vice-principal had power to consent to the search consistent with the Fourth Amendment (App., *infra,* p. 14). Judge Bergen, for himself and Chief Judge Fuld, dissented on the ground that the principal's consent to the search was in part compelled by the invalid search warrant and that "this invalid compulsion under a bad search warrant was as much an invasion of defendant's rights as if the police, under the purported authority of the warrant, had broken the door of the locker or compelled the defendant himself to open it" (App.; *infra,* p. 16). The Court of Appeals remanded the matter to the Appellate Term for consideration of other matters not decided prior to appeal. Petitioner's conviction was thereafter affirmed by the Appellate Term without opinion.

Reasons for Granting the Writ

1. The purported consent was induced by the search warrant and was therefore not freely given. The state has conceded that "the search warrant was properly vacated .... We also acknowledge that a search of the locker by the police alone would be invalid without a warrant" (Brief for Appellant in the Court of Appeals, p. 4). But the court found that the search was valid because the vice-principal had consented to it. The court's decision that one presented with a search warrant which he assumes to be valid may nevertheless be said to have freely consented to the search it purports to authorize raises serious Fourth Amendment questions and is in plain conflict with this Court's decision in *Bumper* v. *North Carolina,* 36 U. S. L. Week 4513 (June 3, 1968).

It is clear that the police officers relied on the search warrant. Officer Pappas testified that petitioner "was searched with the search warrant which gave us permission to search that locker" (R. 123). Their opinion was shared by the vice-principal, who agreed that he was "honoring the search warrant" when he led petitioner and the police to the lockers and opened petitioner's locker, as well as when he first took the police to petitioner (R. 58, 75, 78). At the time of the search, then, all the parties believed that the search was compelled and authorized by the warrant.

The state's contention that the vice-principal acted in spite of the warrant must be viewed in light of this Court's rulings regarding knowing waiver. Where constitutional rights are involved, this Court has stressed that waiver must "truly be the product of . . . free choice," a choice which is made "knowingly and competently." *Miranda* v.

Arizona, 384 U. S. 436, 458, 465 (1966). More precisely, "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). See *Amos* v. *United States,* 255 U. S. 313 (1921); *Johnson* v. *United States,* 333 U. S. 10 (1948); *Gatlin* v. *United States,* 326 F. 2d 666 (D. C. Cir., 1963); *Waldron* v. *United States,* 219 F. 2d 37 (D. C. Cir., 1955). Where it is "petitioner's constitutional right which was at stake . . . and not the [vice-principal's]", this Court has viewed consent with special strictness. *Stoner* v. *California,* 376 U. S. 483, 489 (1964).

In *Bumper* v. *North Carolina, supra,* this Court settled the precise question at issue here. Defendant's grandmother admitted police to her home after they informed her that they had a search warrant. There was testimony that she willingly let the police in, but this Court announced the rule that when " 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant [w]e hold that there can be no consent under such circumstances." 36 U. S. L. Week at 4515. The Court's rationale for the rule is distinctly applicable here:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Ibid.*

The *Bumper* rule should be reaffirmed in this case.

The court below passed over the consent issue on the theory that the vice-principal would have had no reason to resist the search and would in fact be obligated "to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated." App., *infra,* p. 15. But whether or not a school has such an obligation, it has an equally important duty to protect its students from unreasonable searches. To assume that consent would have been granted in this case is to ignore the fact that the school can refuse to allow a search where, for example, police demand to make a search without a warrant. If the retrospective consent approved by the court below is allowable because there is a duty to consent even to an unreasonable search, then school officials are to be denied any discretion in protecting the rights of students under their supervision.

Moreover, a finding of valid consent in this case would weaken the force of the warrant as a dependable instrument which can be relied upon to relieve a citizen of personal responsibility for a search. A search warrant is intended to be obeyed, and the vice-principal quite properly aided the police in their search. But what should he have done had he understood that his aid and acquiescence would later be interpreted as consent to the search? He might well not have cooperated. Under such circumstances, his lack of

cooperation would have been prudent. For the warrant might be vacated and the search ruled improper, though he independently consented to it. A school principal responsible for the protection of his students cannot be deemed privileged to accede to every request a policeman makes. The function of the warrant is to make precise the legal boundaries of a search. To permit the vice-principal's cooperation to do service for informed consent therefore undercuts the power and function of the search warrant and unjustifiably extends the force and meaning of consent. *Bumper* should be reaffirmed here to protect both the viability of the warrant as a reliable authorization to search and the rights of an individual against consent given after presentation of a warrant—a "situation instinct with coercion." *Bumper* v. *North Carolina, supra,* at 4515.

2. This case also presents an important Fourth Amendment question of the scope of the privacy against searches by the police to which a student is entitled while at school. Defendant's right to be free from unreasonable searches and seizures was violated by the New York court's ruling that the right could be waived by the vice-principal.

That the locker was a private place is clear from the record. Each student had the exclusive use of his locker during the school year, and the lockers could be locked, as petitioner's was (R. 77). Search of the locker without valid consent would have been illegal, as respondent conceded in its brief in the court below, *supra.*

This Court has been sensitive to the necessity for privacy from police intrusions, even in situations where privacy is otherwise limited. In *Stoner* v. *California, supra,* the consent of a night clerk was held insufficient justification for a search of defendant's hotel room, even though there was

"'implied or express permission' to [certain persons] . . . to enter his room 'in performance of their duties.'" *Id.* at 489. While the clerk had a right to enter, this right was for certain purposes related to his duties only and was not freely transferable to the police at the "unfettered discretion" of the night clerk. *Id.* at 490. See *United States* v. *Jeffers,* 342 U. S. 48 (1951); *Chapman* v. *United States,* 365 U. S. 610 (1961).

Similarly, in *United States* v. *Blok,* 188 F. 2d 1019 (D. C. Cir., 1951) consent by a government supervisor to search an employee's desk, over which the supervisor clearly had some authority but which was assigned exclusively to the employee, was held not binding on the employee:

> We think appellee's exclusive right to use the desk assigned to her made the search of it unreasonable. No doubt a search of it without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use. But . . . the search that was made . . . was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed. 188 F. 2d at 1021.

See *Holzhey* v. *United States,* 223 F. 2d 823 (5th Cir., 1955); *Reeves* v. *Warden,* 226 F. Supp. 953 (D. Md., 1964).

This Court has recognized that there may be a limited official power to search an area for certain reasons without there being a general power to make a criminal search. Standards for administrative searches by municipal building inspectors have recently been raised virtually as high as standards for criminal searches. *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *See* v. *City of Seattle,* 387

U. S. 541 (1967). It would be anomalous to permit in this case a *lowering* of standards for a criminal search because a right to conduct an administrative search may exist. Indeed, this Court made plain in *Abel* v. *United States,* 362 U. S. 217, 226 (1960) that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." A housing inspector may not by virtue of his power to enter a building admit a policeman searching for evidence of crime. The search at issue here was not a mere search for school purposes but a search by the police for evidence of crime for which a warrant had been issued.

Granting *arguendo* that school officials have supervisory power which may extend to inspection of lockers for certain purposes, what is at stake here is the distinction between inspection of the locker by school officials for school purposes and a criminal search by police. Even if school officials may look for violations of school rules or unsanitary conditions, it may not transfer that right to police searching for evidence of crime. See Knowles, *Crime Investigation in the Schools: Its Constitutional Dimensions,* 4 J. Fam. Law 151 (1964). Compare *Moore* v. *Student Affairs Committee,* 36 L. Week 2750 (M. D. Ala., May 14, 1968) (searches by school officials permissible when non-criminal proceeding will result); *Madera* v. *Board of Education,* 386 F. 2d 778 (2d Cir., 1967), *cert. den.* 36 L. W. 3404 (April 22, 1968) (standard for due process in school hearing depends on seriousness of consequences resulting from hearing).

The power of the vice-principal to consent to the search is even more clearly lacking here because the search was not confined to an inspection of the locker but included a search

of petitioner's coat. Even under its authority to control school premises, school authorities cannot be permitted at will to allow the search of the person or personal effects of its students. Courts have distinguished between the power to consent to the search of a room and the power to consent to the search of the personal effects within the room. *Reeves* v. *Warden, supra; People* v. *Egan,* 58 Cal. Rptr. 290 (1966); *State* v. *Evans,* 45 Hawaii 622 (1962); *U. S.* v. *White,* 268 F. Supp. 998, 1002 (D. D. C., 1966); cf. *Maxwell* v. *Stephens,* 348 F. 2d 325 (8th Cir., 1965) (dissenting opinion). If petitioner had been wearing his coat it would clearly have been protected from a search without a warrant in these circumstances. Though he had to take his winter coat off inside the school, petitioner kept it as private as he could by putting it in his locker. This Court should not accept the lower court's rule that a student in school cannot keep his private belongings private, especially when, as here, no overriding school purpose has been shown as to the coat. Particularly where criminal charges may result, the school should not be held to have the same power over the personal effects of its students as it does over school premises.

The New York court below rested its decision largely on the broad supervisory power of the school. But the teaching of *In re Gault,* 387 U. S. 1, 13 (1967), that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," indicates the limits of this power. If the guarantee against unreasonable searches and seizures "marks the right of privacy as one of the unique values of our civilization," *McDonald* v. *United States,* 335 U. S. 451, 453 (1948), it is unthinkable that minors while attending school could forfeit these rights and thereby suffer criminal penalties. One does not waive his rights to due process by going to

school. *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir., 1961), *cert. denied*, 368 U. S. 930 (1961); *Wasson* v. *Trowbridge*, 382 F. 2d 807 (2d Cir., 1967); *Knight* v. *State Board of Education*, 200 F. Supp. 174 (M. D. Tenn. 1961). While petitioner was subject to supervision by the school, he retained his rights against outside authorities which the school could not waive for him or force him to waive.

If the school is to perform its educational function properly, it must be given authority over what goes on in the classroom. But where a school official attempts to delegate his authority to the police, the school's broad discretion in teaching matters should not obscure the fact that what are at stake are individual rights against a search for evidence of crime.*

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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* Counsel wish to acknowledge the assistance of David N. Rosen, third year student at Yale Law School, in the preparation of this petition.

APPENDIX

Opinion of the Court of Appeals of the State of New York

The People of the State of New York, Appellant v. Carlos Overton, Respondent.

Argued June 1, 1967; decided July 7, 1967

KEATING, J. Three detectives of the Mount Vernon Police Department having obtained a search warrant went to the Mount Vernon High School. The warrant directed a search of the persons of two students and, also, of their lockers.

The detectives presented the warrant to the vice-principal, Dr. Panitz, who sent for the two students, one of whom was the defendant, Carlos Overton. The detectives searched them and found nothing. A subsequent search of Overton's locker, however, revealed four marijuana cigarettes.

The defendant moved to invalidate that portion of the search warrant which directed a search of his locker, on the ground that the papers were defective upon which it was based. This motion was granted. The court denied the motion to suppress, however, on the grounds that the vice-principal had consented to the search and that he had a right to do so. The Appellate Term reversed and dismissed the information, holding that the consent of the vice-principal could not justify an otherwise illegal search. The People have appealed from this order of the Appellate Term.

It is axiomatic that the protection of the Fourth Amendment is not restricted to dwellings (*Go-Bart Co.* v. *United*

States, 282 U. S. 344). A depository such as a locker or even a desk is safeguarded from unreasonable searches for evidence of a crime (*United States* v. *Blok,* 188 F. 2d 1019).

There are situations, however, where someone other than the defendant in possession of a depository may consent to what otherwise would have been an illegal search. Such a case was *United States* v. *Botsch* (364 F. 2d 542 [2d Cir., 1966], cert. den. 386 U. S. 937). In that case, the defendant had rented a shed from one Stein. Stein retained a key to the shed and accepted deliveries on behalf of the defendant. When the police approached Stein and informed him of their suspicion that the defendant was receiving goods obtained through fraud, Stein consented to a search of the shed.

In upholding the search, the court noted two significant factors. First, Stein had a key to the shed and, second, more than a mere landlord-tenant relationship existed, since Stein was empowered to take deliveries on behalf of the defendant. The court also noted that Stein had a right to exculpate himself from implication in the defendant's scheme.

Considering all these factors cumulatively, the court concluded that, in this situation, Stein could give consent to the search. Thus, the search was not unreasonable in contravention of the Fourth Amendment.

The relationship between school authorities and students is likewise a distinctive one. The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue de-

veloping both intellectually and socially, have a right to expect certain safeguards.

It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age increases the danger.

Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.

When Overton was assigned his locker, he, like all the other students at Mount Vernon High School, gave the combination to his home room teacher who, in turn, returned it to an office where it was kept on file. The students at Mount Vernon are well aware that the school authorities possess the combinations of their lockers.

It appears understood that the lock and the combination are provided in order that each student may have exclusive possession of the locker vis-à-vis other students, but the student does not have such exclusivity over the locker as against the school authorities. In fact, the school issues regulations regarding what may and may not be kept in the lockers and presumably can spot check to insure compliance. The vice-principal testified that he had, on occasion, inspected the lockers of students.

Indeed, it is doubtful if a school would be properly discharging its duty of supervision over the students, if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, he was obligated to inspect the

locker. This interest, together with the nonexclusive nature of the locker, empowered him to consent to the search by the officers.

Accordingly, the order of the Appellate Term should be reversed and the matter remitted to that court for consideration of the other points raised by the defendant which were not decided on the prior appeal.

BERGAN, J. (dissenting). The District Attorney concedes the search warrant was bad, i.e., "We acknowledge, to take as many issues out of the case as possible, that the search warrant was properly vacated". Defendant had paid for personal use of the locker and, as far as he was concerned, the People also admit, a search of the locker by police without a warrant "would be invalid".

No doubt the principal of the school had a supervisory power to inspect the locker. But if an invalid warrant was used to compel him to exercise this power, and if it adversely affected the constitutional right of the defendant to be secure against unlawful search and seizure, this invalid compulsion under a bad search warrant was as much an invasion of defendant's rights as if the police, under the purported authority of the warrant, had broken the door of the locker or compelled the defendant himself to open it.

There can be no doubt, reading this record, that the principal opened the door, not because he was exercising a free supervisory control over the locker in the interest of the school program, but because he felt the invalid search warrant compelled him to do so. He affirmatively answered the question that in opening the door he was "honoring the search warrant".

Nor does *United States* v. *Botsch* (364 F. 2d 542) support the People in this case. There, the owner of a rented shed, having a key and requested by the tenant to deposit certain

deliveries of goods in the shed, became concerned about his own involvement in a crime, and invited postal inspectors, without a warrant, to come into the premises. This has no relevance to the effect of compulsion exerted by an invalid warrant on the rights of a person affected by such compulsion.

The order should be affirmed.

Judges VAN VOORHIS, BURKE, SCILEPPI and BREITEL concur with Judge KEATING; Judge BERGAN dissents and votes to affirm in an opinion in which Chief Judge FULD concurs.

Order of Appellate Term reversed and matter remitted to that court for further proceedings in accordance with the opinion herein.

Opinion of the Appellate Term

Cal. No. 74, The People of The State of New York, Respondent v. Carlos Overton, Appellant (W). 2469

Judgment and order denying motion to suppress evidence reversed on the law, motion granted and information dismissed.

The warrant, in so far as it directed a search of defendant's locker in a public high school was vacated by the trial court. The search was illegal and cannot be justified upon the theory of consent on the part of the vice-principal of said school. Defendant had the exclusive use of the locker in question and the purported consent to search it was not binding upon him. The confession obtained from defendant, being the product of the illegal search and seizure, was inadmissible against him (*People* v. *Rodriguez,* 11 N. Y. 2d 279, 286). Absent any competent evidence upon which the conviction can be upheld, we are constrained to dismiss the information.

McDonald and Groat, JJ., concur.

Fanelli, J., not voting.

Decision of Hon. John P. Griffith Denying Motion to Suppress

COURT OF SPECIAL SESSIONS,

MOUNT VERNON, NEW YORK

PEOPLE OF THE STATE OF NEW YORK

against

CARLOS OVETTON,

Defendant.

On the 21st of December, 1964 the detectives of the Mount Vernon Police Department secured a warrant from this Court in connection with an investigation of the defendant, Carlos Overton, and another. The warrant itself directed a search of the persons of the two individuals and of the automobiles respectively driven by each of them, and also "on the grounds of the Mount Vernon High School * * * and or, in lockers 154 and 2684 of the Mount Vernon High School used by Carlos Overton and another."

The affidavit on which the warrant was based does not state any facts concerning the search of the school grounds or of the respective lockers of the boys who are under investigation.

Subsequent to the issuance of the warrant, the three detectives presented themselves at the office of Dr. Panitz, Vice-Principal of the high school. Dr. Panitz and the Principal Dr. Spalding were at an officers' meeting with

the Superintendant of Schools, but returned to their office shortly afterwards. They pointed out Carlos Overton and the other youth who were taken to the office of Dr. Panitz. While in Dr. Panitz's office, both youths were searched and nothing in the way of contraband was found. Detective Pappas then said to Mr. Overton, "If we searched your locker, we would find the narcotics there." Mr. Overton, it was testified, nodded his head in the affirmative.

The attorney for the defendant moves to invalidate that portion of the search warrant which directed a search of the grounds of the high school and the lockers. This motion was granted.

The next question is as to whether or not the search can be sustained on other grounds. The Court finds that the Vice-Principal of the Mount Vernon High School retained dominion over all the lockers which were assigned to individual students in that institution. This fact was made known to the boys, and Dr. Panitz testified that on many occasions he had opened lockers without the boys' knowledge.

The Court has examined the doctrine of consent and finds that there has been no New York cases that have been brought to the attention of the Court. However, in the case of *Morris* v. *Comm. Ky.*, 208 S. W. 2d 58, wherein it is held that a father may consent to a search of his home for implements used by his son in the commission of a crime, and similarly, Henry B. Rothblatt in his recent book has the following observation, New York Law Journal, January 21, 1965:

> "Only a person who could have resisted the search as an invasion of his personal rights, or somebody specifically authorized by him to consent to the search, may offer such consent."

The defendant's attorney has cited many cases concerning hotel rooms and furnished rooms and other quasi residential quarters, but these can be distinguishable from the case herein because in the cases cited by the attorney for the defense the room could be opened for the purpose of cleaning the same for making the beds, refurbishing the bathroom accoutrements, but not to search the luggage or the bureaus in which the patron's possessions might be stored. However, in the instant case The Board of Education, through Dr. Panitz, retained dominion over the use of the lockers and the Court finds that the search was legal.

For all of the above reasons, the motion to suppress is denied.

The question as to the sufficiency of the information will be taken up at a later date inasmuch as the same is premature on this hearing.

Dated: March 19, 1965.

JOHN P. GRIFFITH,
City Judge of Mount Vernon.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 212

CARLOS OVERTON,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Questions Presented

The following questions are presented by this appeal:

1). Was the petition for the writ of certiorari timely brought as provided for by the Revised Rules of this Court, Rule 22, subdivisions 1 and 2?

2). Was the search of a student's school locker by the vice-principal of the school violative of the Fourth Amendment?

Statement

There was no trial of this matter, but the evidentiary facts out of which this violation arose are adequately set forth in the suppression hearing held before the Court of Special Sessions on February 25, 1965, and March 1, 1965. Where numerical references are used they refer to pages of the Record on Appeal.

On December 21, 1964, detectives of the Mount Vernon Police Department secured a search warrant which purported to authorize them to search the persons of the respondent and one George Cabell, Jr., the automobiles owned by the parents of the two, the home of each and the school locker of each (9, 10). Armed with this warrant, three Mount Vernon detectives, Pappas, Arrington and DiMarzo, went to the Mount Vernon High School (100). When they arrived there they went directly to the office of the vice-principal, Dr. Adolph Panitz. Dr. Panitz was at a meeting of the Board of Education (140), but he was reached by telephone, and he returned to the school (45).

When Dr. Panitz arrived, the search warrant was displayed to him (141), and he went to the school cafeteria, located Cabell and the respondent, and then went and brought the three detectives to them in the cafeteria (46). The detectives brought the two youths back to Dr. Panitz's office and required them to empty their pockets. After what seems to have been a brief interrogation the school custodian, a Mr. Tuccillo, accompanied the Cabell boy and Dets. Arrington and DiMarzo to Cabell's locker, leaving Dr. Panitz, the respondent and Det. Pappas in the office (46, 70). Pappas asked the respondent a few questions in Panitz's presence. Among those questions were these two: "If we go to your locker will we find anything", and the answer to that by the respondent was a shrug (103). The detective then said to him, "I am pretty sure if we go to

your locker we're going to find something'' (103). Testimony varied as to the respondent's reaction to this. Pappas said he said either ''I guess so'' or ''Maybe'' (103). Dr. Panitz, however, recalled that he nodded (47).

When shortly thereafter the other two detectives, Cabell and the custodian returned to the office, presumably having searched Cabell's locker in the interval, Pappas, Panitz, the respondent, the custodian and DiMarzo went to the respondent's locker, leaving Arrington and Cabell in the office (47, 142). Dr. Panitz opened the locker with a master key and a jacket was observed hanging in it. Pappas asked the respondent if the jacket was his, and on receiving an affirmative answer he searched the pockets and found four marijuana cigarettes (76-80, 104).

What remains of the facts of this case following the recovery of the cigarettes is not germane to this appeal, but just to tidy up the narrative and not leave it in mid-air, the respondent was then arrested and taken to Mount Vernon Police Headquarters where he gave a statement and was charged with the possession of the cigarettes (105-106, 144).

Thereafter the respondent moved in the Court of Special Sessions for an order vacating the search warrant and the suppression as evidence of the marijuana (13, 14), and an evidentiary hearing was ordered thereupon (24). There then followed the hearing from which the foregoing facts were taken (32-213). At the conclusion of this hearing the Court of Special Sessions, Honorable John P. Griffith, C. J., vacated the warrant but nevertheless denied the motion to supress the evidence on the theory that, while the police may not have had the right to search the locker, Dr. Panitz, as the representative of the Board of Education, did have such a right (215-216). This is the determination with which the Appellate Term could not agree and the basis on which the adjudication was reversed (242).

However, on appeal to the New York Court of Appeals, the order of the Appellate Term was reversed, and the matter was remanded to that Court for a consideration of the further points raised by Overton before that Court. By its order of March 22, 1968, the Appellate Term affirmed in full the adjudication of the Court of Special Sessions of the City of Mount Vernon.

POINT I

The petition for the writ of certiorari was not timely filed.

The sole question presented to the Court by this petition as to which it is asked to exercise its discretion is the propriety of the holding by the New York State courts that in the circumstances presented by this appeal the vice-principal of the Mount Vernon High School had the constitutional right to inspect the petitioner's school locker and the contents thereof. Without going into the merits of that question, because it will be discussed fully at Point II, *infra*, it is submitted that this issue was finally, irrevocably and irretrievably decided by the New York Court of Appeals on July 7, 1967, *People* v. *Overton*, 20 N. Y. 2d 360. In point of fact, it was the only issue the Court of Appeals considered. On that Court's remand to the Appellate Term, there wasn't the remotest possibility of any contrary determination of the point. That, then, not now, was the time to bring the matter to this Court, and, in terms of Rule 22, the petitioner's time within which to do so terminated on October 5, 1967. Again in terms of Rule 22, the maximum extension of that time which he could have been allowed, had he applied for it, and he didn't, would have been sixty days or until December 4, 1967. He thus failed by more than half a year to meet the optimum deadline.

The petitioner takes the view that the determination of the Court of Appeals was not final and that the final order in the case came from the Appellate Term on March 22, 1968, when it affirmed his adjudication as a Youthful Offender. Even adopting that view, which we regard as specious because, as we have pointed out, the Appellate Term was totally without authority to review the only question presented to this Court, but even adopting that view, the petition is untimely. Rule 22(1) deals, as the Court knows, with a state court of last resort, and as to such a court's determination the ninety day time limit applies. The Appellate Term, however, is an intermediate appellate court, so as to that Court, Rule 22(2) applies, and, again not to instruct this Court, the thirty day limitation obtains. Therefore, calculating from March 22, 1968, the date of the affirmance by the Appellate Term, the petitioner's time within which to file this petition expired on April 21, 1968, or, taking it over to the next following business day, April 22nd. If he had applied for it, and, again, he didn't, he might have gotten a thirty day extension, Rule 22(2), until May 21, 1968, but after that date this Court was without jurisdiction to entertain the petition.

In a letter to this Court dated June 25, 1968, petitioner's co-counsel, David C. Gilberg, Esquire, stated:

> "In my opinion, there would have been no purpose gained by applying for leave to appeal to the Court of Appeals from the matters remitted to the Appellate Term and affirmed by it."

In other words, there was a calculated determination by petitioner or his legal advisors not to take this case to the Court of Appeals, New York State's court of last resort. This has more than a casual significance, because it tends to show that he too regarded the decision of the Court of Appeals of July 7, 1967, as conclusive of the ques-

tion of the validity of the search, and it brings into serious doubt his claim that the March 22, 1968 decision of the Appellate Term was the final order on that point.

Following our letter to this Court of June 20, 1968, a copy of which was sent to Mr. Gilberg, in which we pointed out that no appeal had been taken to the Court of Appeals, the petitioner on July 11, 1968 made application for permission to appeal to the Court of Appeals. It was months too late, though, New York Code of Criminal Procedure, § 521, and, predictably, on July 29, 1968, that permission was denied by Honorable Kenneth B. Keating, Associate Judge of the Court of Appeals.

The petitioner freely chose not to go to the Court of Appeals with this case at the time when he could and should have done so, and at the same time, he allowed his time within which to bring this petition to expire. He now seeks to confer jurisdiction on this Court by attempting to breathe new life into this wholly lifeless case with a frantic, and foredoomed, application to the Court of Appeals whose ruling he can then show this Court as indicative of the continuing vitality of the whole case. It is submitted that he should not be permitted to do so.

POINT II

The search of the petitioner's locker was valid, and the evidence was rightly held to be admissible.

This entire question hinges, it is submitted, on whether or not Dr. Panitz, as the representative of the Mount Vernon Board of Education or as the vice-principal of the Mount Vernon High School, had the right to enter and search the locker assigned for his use to the petitioner by the Board or by the High School. We submit he had. We acknowledge, to take as many issues out of the case as possible, that the search warrant was properly

vacated. The affidavits in support of the warrant (6-8) made absolutely no reference to the petitioner's school locker, and there is nothing therein contained which would justify the issuing magistrate in believing that a search of the locker should be authorized. We also acknowledge that a search of the locker by the police alone would be invalid without a warrant. We submit, however, that a search of the locker by Dr. Panitz was in every way proper.

The respondent argued before the State Courts and presumably will argue again before this Court that Dr. Panitz, when he searched the locker, was acceding to the mandate of the search warrant and was therefore not of his own authority conducting such search. It is submitted that this argument is insupportable in view of Panitz's plain renunciation of that suggestion. The following dialogue between the doctor and the prosecutor appears at page 93 of the Record:

> "Q. Now, I recall, in answer to a question put to you by Mr. Gilberg concerning this search warrant, that the question, in substance, was, 'Did you rely upon that search warrant?' and your answer, in substance, was, 'Not entirely.' Do you recall that? A. Yes, I do.
>
> Q. Will you tell the Court what you meant by 'not entirely'? A. Being responsible for the order, assignment, and maintenance of the physical facilities, if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker."

We may therefore confine ourselves to a discussion of Dr. Panitz's right to inspect the locker, the conclusion being unavoidable that he was exercising such a right.

In the City of Mount Vernon title in all school buildings and property is vested in the Board of Education (38), and the administrators of the various schools operate them in the capacity of owner's representatives (38-39), and in

Mount Vernon High School that function is exercised by Dr. Adolph Panitz. Under his direction and supervision desks and lockers are assigned to students for their use (39-40). There are regulations governing the use to which the facilities may be put, and these regulations prohibit, among other things, the storage of material which is violative of the law (41).

Dr. Panitz testified that as vice-principal of the high school his responsibilities included the maintenance and supervision of the buildings, the grounds and the physical equipment of the school and that among his other duties was the assignment of lockers to students (48). He described the assignment of lockers. At the beginning of each school year all the school locker combinations are changed. The locker number and the combination of the locker are endorsed on a perforated card in such a way that when the card is divided each number is on each piece. The assignment consists of allocating one locker to each student, at which point a note of the assignment is made and the card is divided. The student retains one-half, and the home room teacher the other, and the second half thus becomes a part of the school records. This is done because it is the school's responsibility to have access to such lockers at all times (49).

In addition, each locker can be opened by a master key of which Dr. Panitz had one of the only two and the head custodian the other, and from time to time these lockers were opened by one or the other of these men (50). The students are aware that their lockers are subject to being opened by the school authorities as demonstrated by their giving the school the second half of the locker assignment card bearing the combination (51). Regulations on what may be kept in the lockers are communicated to the students, although it did not appear affirmatively that the petitioner knew these regulations (52-53), and the authorities are given the right to open school lockers to enforce the proper utilization of these facilities (48).

In this atmosphere, then, and despite these regulations, the petitioner insists that the school authorities did not have the right to inspect the contents of his locker. One of the arguments he made in the State courts was that the school assigned the locker to him for his use exclusively, and no doubt that is true, but the generic sense of the word amply limits the measure of that exclusiveness. If one questions who is to be excluded it becomes instantly apparent that only other students were to be denied access to the locker. Each year the combination to each locker was changed, and five years would elapse before a given combination to a particular locker would be repeated. No student could pass on his combination for last year's locker, because it would not be the same (49), and the five year cycle patently was intended to insure that throughout a student's entire high school career the combination to any specified locker would never be the same. However, notwithstanding these elaborate precautions to insure the student's privacy, every year every student routinely surrendered the combination to his locker to the school authorities (49). Palpably, the concept of exclusiveness of access to the lockers did not restrict the school administrators in the performance of their duties. This is further exemplified by the master keys kept by Dr. Panitz and the head custodian.

This thesis does not need to be belabored because it is at the heart of every inquiry as to the propriety of a search, but both the United States Constitution (Amendment IV) and the New York State Constitution (Art. 1, § 12) condemn only unreasonable searches. Therefore, while we reject as unreasonable a general and uninhibited right to search a person, we must at the same time acknowledge that conditions can exist which make such a search acceptable. For example, who would deny the right to search an accident victim for means of identification? This is even anticipated by many people as demonstrated by their carrying a card in their wallets

designating who is to be notified in an emergency and sometimes asking that a clergyman be called.

Therefore, the question that must be answered here is whether the inspection of the petitioner's locker by the vice-principal was unreasonable. This Court said in *Go-Bart* v. *United States,* 282 U. S. 344:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

and in *Terry* v. *Ohio,* —— U. S. ——, 88 S. Ct. ——, 20 L. E. D. 2nd 889, 899

> ". . . wherever an individual may harbor a reasonable 'expectation of privacy,' id., at 361, 19 L. Ed. 2d at 588 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' Elkins v. United States, 364 U. S. 206, 222, 4 L. Ed. 2d 1669, 1680, 80 S. Ct. 1437 (1960)."

The facts and circumstances of this case, it is submitted, indicate that this search was far from unreasonable. The respondent at the time of this search was a youth seventeen years of age and a senior in high school (78). In the contemplation of the law he was an infant. As an infant, he was precluded from exercising certain of the rights that come with majority. He can not marry, for example, without parental consent, New York Domestic Relations Law, § 15; he may be disciplined by the reasoned use of force, New York Penal Law (1909), § 246(4); he is prohibited from buying intoxicants, New York Alcoholic Beverage Control Law, § 65. There are many other illustrations which we could use, but we believe we have made the point; the privileges enjoyed by a minor are not absolute.

All of this is not to say, of course, that a minor may be searched with impunity by police officers or the public at large, but there is a certain limited class of persons to whom he must remain subservient and who, in the proper exercise of their tutelary authority over him, may deprive him of certain of the rights he may demand from others. Obviously, his parents or legal guardians would fall into this class, and if the reasonable control which they may validly exercise over his activities slips or seems in danger of slipping the courts will step into the picture and re-establish it, New York Code of Criminal Procedure, §§ 913-a to 913-d.

It is widely recognized that a parent who retains dominion over given premises to which the child also has access may consent to a search of such premises, even that portion which is set aside for the child's use, *Dalton* v. *Indiana,* 230 Ind. 626, 105 N. E. 2d 509. See Annotation, 31 A.L.R. 2d 1078, § 3. See also *Marlar* v. *Bill,* 181 Tenn. 100, 178 S. W. 634; *Rees* v. *Payton,* 225 F. S. 507, aff'd 341 F. 2d 859; *Rees* v. *Commonwealth,* 203 Va. 850, 127 S. E. 2d 406, cert. denied 372 U. S. 964; *State* v. *Carder,* 9 Ohio 2d 1, 222 N. E. 2d 620; *Commonwealth* v. *Hardy,* 423 Pa. 208, 223 A. 2d 719; *State* v. *Kinderman,* 271 Minn. 405, 136 N. W. 2d 577, cert. denied 384 U. S. 909; *Maxwell* v. *Stevens,* 229 F. S. 205, 348 F. 2d 325, cert. denied 382 U. S. 844; *McGray* v. *State,* 236 Md. 9, 202 A. 2d 320; *Commonwealth* v. *McKenna,* 202 Pa. Super. 360, 195 A. 2d 817; *Williams* v. *State* (Tex. Crim.), 298 S. W. 2d 590; *State* v. *Haggard,* 89 Idaho 217, 404 P. 2d 580.

It is submitted that in and upon school buildings and grounds during normal school hours, school authorities must have corresponding authority to that of the parents over their pupils, for they exercise corresponding functions. They act, in every sense of the word, *in loco parentis.* They undertake the responsibility not only of educating but of maintaining order among large groups of children. The law specifically recognizes their right to inflict corporal

punishment, New York Penal Law (1909), § 246(4), and, very pointedly, the law confers that authority on no one other than teachers and parents.

The petitioner urges that the rule laid down by this Court in *Bumper* v. *North Carolina*, —— U. S. ——, 20 L. Ed. 797, S. Ct. ——, be broadened to include this present situation. They are not governed by the same principle, it is submitted. It is probably a fair appraisal of the *Bumper* case to say that, had it not been for the search warrant shown to her by the police, Bumper's grandmother would not have permitted the search. Assuredly, she would not have conducted a search herself. In the petitioner's evaluation of this matter, i.e., that Dr. Panitz bowed to the authority of the warrant, he may feel justified in arguing that, but for the warrant, there would have been no search and so equating this and the *Bumper* situations. In that assertion, however, it is submitted he is incorrect. In this case we have a responsible school administrator to whom has been reported by the police the well-grounded belief that one of his students is presently in possession of narcotics. Pursuant to a warrant, that student is brought to his office and searched. Following that search and right in Panitz's presence, the following occurred:

> "Q. That's with reference to Cabell. Now, respecting the defendant Overton? A. He remained in my office with another police officer who began to question him. During the questioning somewhere, the problem came up, or the question came up, whether he had possession of marijuana. He did not answer. Then the officers pursued the questioning, and said something about looking in his locker. 'You have it in your locker.' Thereupon, Overton sort of nodded.
>
> Mr. Gilberg: I move to strike out 'sort of.'
>
> The Court: He's indicated what he did, the way he nodded his head.
>
> Mr. Gilberg: All right.

By the Court:

Q. Is that the exact physical motion he made? A. That's right." (46-47) (Testimony of Dr. Adolph Panitz.)

Despite this clear admission by the petitioner in Panitz's presence that narcotics were concealed in the school building, he would nevertheless have this Court believe that Dr. Panitz, whose clear responsibility it was to prevent such activities (41, 48), stands in the same position as Mr. Bumper's grandmother and would not independently and on his own authority have searched the locker. Such a contention flies in the face of both reason and experience.

More than that, the thesis is flatly contradicted by Dr. Panitz himself who, when questioned on the point, said:

"Being responsible for the order, assignment, and maintenance of the physical facilities, if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker." (93)

Dr. Panitz, it is submitted, can not be identified, even superficially, with Mr. Bumper's grandmother.

The petitioner seeks also to draw an artificial distinction between the school's right, a right, incidentally, the existence of which he seems almost to concede, to inspect a locker and its right to inspect the contents of that locker, represented in this case by his coat. It is obviously not a matter of unconcern to the respondent, but this Court, it is submitted, ought to take a forthright stand one way or the other. Either a school official has the right *effectively* to inspect a student's locker or he hasn't, and the imperatives of effective inspection are not satisfied by a license to open the locker door and simply to peer in. The petitioner seeks to make much of the theory that what was

examined was his coat, a piece of wearing apparel. We believe that the Court will agree that if the petitioner were to drape himself in a bedsheet it would be, in the use to which it was being put, immune from a search. If, however, he were to hang the same bedsheet immediately inside his locker door in such a way as still to conceal the locker's contents after the door was opened, we can not believe that the Court would authorize the opening of the locker door and at one and the same time prohibit the pushing aside of the sheet. It is only a simple exercise in logic to demonstrate that, where there is the power to give a command, there must be the correlative power to enforce obedience to it. That being so, if there is reposed in the Board of Education the power to regulate what may be stored in the lockers of the Mount Vernon High School, and manifestly there is (53), then there must be the power to effectuate those regulations, and an inspection of the lockers is the only realistic way of doing so.

Lest the Court believe that there is something sacrosanct about a locker per se, its attention is respectfully directed to the California case of *People* v. *Shepard,* 28 Cal. Rptr. 297. In that case, the locker of a sailor was opened by the police with the consent of a Marine Corps officer, and the California Appellate Court upheld the validity of that search.

With the exception of *People* v. *Shepard, supra,* which is not directly in point because it does not involve a pupil-teacher relationship, the present case, as far as we have been able to ascertain, is one of first impression both in New York and in the United States. For that reason, we venture to suggest to the Court that, while it is not paramount, a consideration of policy enters into this case. All over the United States, while regulations and standards vary, parents are compelled under pain of some punishment to send their children to school; see, for example, New York Education Law, Article 65, Part I. Every day

millions of children troop off to thousands of schools, and, at least in New York, and we suspect everywhere else, anyone who attempts to interfere with a child's doing so can be imprisoned, New York Education Law, § 3228. And to what do they troop off, to a day of liberty and license the scope of which is measured only by the limits they choose to put upon it, ungoverned and unrestricted by any meaningful supervision by the school authorities? The average parent would insist upon a more authoritarian babysitter. If a teacher hasn't got the prerogatives necessary to keep potentially lethal drugs out of the hands of her students, then the only alternative remaining to the conscientious parent is to withdraw his child from school. Since he can not by law do so, neither alternative is acceptable. It is submitted that the unique relationship which exists between the teacher and the pupil amply warrants the former in doing what Dr. Panitz did here.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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By:
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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Petition for Writ of Certiorari Was Timely Filed

Petitioner filed his petition for certiorari on June 19, 1968 within ninety days after the final judgment of the Appellate Term of the Supreme Court of New York[1]

[1] There is no right of appeal to the New York Court of Appeals, though Sections 519 and 520 of the New York Code of Criminal Procedure allow discretionary appeal. Section 520 provides:

* * * * *

> If a judge of the court of appeals or a justice of the appellate division of the supreme court of the department in which such conviction was had makes a certificate granting permission

(March 22, 1968). On July 11, 1968 petitioner applied for leave to appeal to the Court of Appeals of the State of New York, the highest state tribunal, alleging that the application was in time, since no final order had ever been served on him. The New York Court of Appeals recognized that the state appeal was timely when on July 29, 1968, Judge Kenneth Keating denied leave to appeal certifying that "upon application timely made, . . . and upon the record and proceedings herein," no question which ought to be reviewed by the Court of Appeals was presented.[2] The timely completion of the state appellate process when read alongside decisions of this Court respecting finality conclusively establish the timeliness of the petition for certiorari in this case.

It is settled that a state court judgment, to be final, "must be subject to no further review in any other state tribunal." *Market Street R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551 (1945). Further,

> "[I]t must be clear that definitive disposition has been made of all the legal and factual issues in the case, not just the important ones or the federal ones. Thus 'the requirement of finality has not been met merely because the major issues in the case have been decided and only a few loose ends remain to be tied up. . . .'

---

to appeal and certifying that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

* * * * *

[2] A certified copy of the Order of the Court of Appeals has been filed with the Clerk of this Court.

Republic Natural Gas Co. v. *Oklahoma*, 334 U. S. 62, 68."[3]

Contrary to respondent's contention, therefore, a petition for certiorari to review the first decision of the Court of Appeals of July 7, 1967, would have been proper only if "the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72 (1946).

The record shows that such finality had not been achieved by the July 7th decision of the New York Court of Appeals. This case had been appealed pursuant to a special procedure under New York law allowing appeal after denial of a Motion to Suppress.[4] The purpose of this procedure, as counsel noted in his affidavit supporting the Motion to Suppress, is "[s]o that the issues of the reception in evidence be properly raised and disposed of before trial, and

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[3] Stern and Gressman, Supreme Court Practice 76 (Third Ed. 1962).

[4] Section 813-c of the New York Code of Criminal Procedure provides:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.
>
> * * * * *
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

not during or as part thereof" (R. 15). Thus other matters of defense were reserved until the question of tainted evidence was resolved by the New York Court of Appeals. Once that issue was settled, Sec. 543-b of the New York Code of Criminal Procedure required the New York Court of Appeals to remand the matter for determination of the other issues and of the facts.[5] Thus, after decision on the Motion to Suppress, the New York Court of Appeals ordered "the matter remitted to that court [the Appellate Term] for consideration of the other points raised by the defendant which were not decided on the prior appeal."[6]

The Appellate Term on remand, therefore, had before it all the unresolved issues that had been raised in the original Notice of Appeal and Affidavit of Errors to the Appellate Term (R. 231-239). On remand, petitioner filed with the Appellate Term Appellant's Brief on Remand From the Court of Appeals. This brief was not a part of the record in this case but has now been filed with the Clerk of this Court. Petitioner therein at pp. 2 and 4 urged that: "Under the decision of the Court of Appeals, herein, the

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[5] "*§543-b.* The court of appeals, upon reversing or modifying a determination of one of the intermediate appellate courts referred to in section five hundred seventeen, where it appears that the findings of fact in the court of original instance were not affirmed or considered by such intermediate appellate court, or where it must be presumed, as required by section five hundred forty-three-a, that the questions of fact were not considered by such intermediate appellate court, shall not render a determination based upon the findings of fact made in the court of original instance, but shall remit the case to the intermediate appellate court for determination upon the questions of fact raised in that court."

[6] See certified copy of the opinion of the New York Court of Appeals, p. 4. It is clear that no mere ministerial act remained to be done such as would follow a mandate to enter judgment. See *Cole* v. *Violette,* 319 U. S. 581 (1943); *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 382 (1953).

issues remitted for review and determination by this Court are those matters specified a. through g. . . . both factual and legal":

"a. Insufficiency in law of informations filed against defendant,

b. Suppress and return of evidence illegally obtained, representing contraband and confession,

c. Arrest and detention without probable cause and under simulation of a legal search warrant,

d. Opening of his school locker as being illegal,

e. Search of the coat therein without defendant's consent violating his constitutional rights,

f. Failure on the part of the police to disclose identity of informer,

g. Failure to direct production of school records and permit the same to be used on cross-examination."

These issues were resolved unfavorably to petitioner by the Appellate Term in a confidential opinion now on file with the Clerk of that court. Had that court decided any of them favorably to petitioner, review by this Court would have been unnecessary and therefore foreclosed. With issues outstanding which could have terminated the case in the state courts, this Court, following its usual practice, would not have found the case ripe for Supreme Court review had petitioner sought certiorari following the first decision of the Court of Appeals.[7]

[7] The remand and second appeal were clearly required before certiorari could be sought. Under this Court's decisions, the second appeal is necessary even if the appellate tribunal considers itself

Where an appellate court declines review, the lower court's judgment becomes that of the highest court in which decision could be had. *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Rock*, 279 U. S. 410 (1929); *Virginian R. Co.* v. *Mullens*, 271 U. S. 220 (1946);[8] Stern and Gressman, *supra* at 89. Thus the judgment of the highest court in this case was that of the Appellate Term. However, if there is discretionary review by a higher state court such review must be sought. *Stratton* v. *Stratton*, 239 U. S. 55 (1915); *Matthews* v. *Huwe*, 269 U. S. 262, 265-266 (1925). Although such review was not originally sought herein, petitioner was able to make an effective cure; on July 29, 1968 review was denied on the merits and not dismissed as being out of time. That denial conclusively settles the question of state law raised by respondents (at p. 5) that petitioner's appeal from the Appellate Term was out of time.

Since the denial of leave to appeal by the Court of Appeals is dated July 30, 1968 no question arises as to the timeliness of the petition for certiorari herein. Even if the petition were premature as originally filed, the completion of the appellate process thereafter rendered the petition timely, since the ninety-day time period for filing for certiorari would then run from July 30, 1968, the date of the denial of review.

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bound by its prior decision, rendering the second appeal a mere formality. *McComb* v. *Knox County*, 91 U. S. 1 (1875); *Great Western Teleg. Co.* v. *Burnham*, 162 U. S. 339 (1896).

[8] Thus recently in another New York case, *Ginsberg* v. *New York*, 390 U. S. 629 (1968), the Appeal was noted not from the New York Court of Appeals but from the Appellate Term of the Supreme Court of New York, Second Judicial Department.

CONCLUSION

For the reasons stated above, the petition in this case was timely filed and certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 212

CARLOS OVERTON,

Respondent,

vs.

THE STATE OF NEW YORK,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, NINTH AND TENTH JUDICIAL DISTRICTS.

PETITION FOR REHEARING ON WRIT OF CERTIORARI

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Opinions Below

The decision of the Court of Special Sessions is unreported and appears in the Record at pp. 214-16. It is set forth in the Appendix to the petition for certiorari, pp. 19-21. The opinion of the Appellate Term is reported at 51 Misc. 2d 140 (1966) and appears in the Record at p. 242. It is set forth in the Appendix, p. 18. The opinion of the New York Court of Appeals is reported at 20 N. Y. 2d 360 (1967) and is set forth in the Appendix, pp. 13-17. This

Court in a decision of October 28, 1968, thus far unreported held:

> "The petition for a Writ of Certiorari is granted. The judgment of the Appellate Term of the Supreme Court of New York is vacated, and the case is remanded for further consideration in light of *Bumper* v. *North Carolina,* 391 U. S. 543. Mr. Justice Black dissents and would affirm the judgment of conviction here."

Grounds of Petition

The petitioner here (the respondent in the original petition for the writ of certiorari) grounds this petition on its belief and its respectful submission to the Court that the Court has misapprehended the decision of the New York Court of Appeals in this case. While on the one hand the Court of Appeals at 20 N. Y. 2d 363, Appendix, p. 15, held:

> "Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, he was obligated to inspect the locker.",

this Court, on the other, by its allusion to *Bumper* v. *North Carolina,* 391 U. S. 543, seems to suggest that the search conducted here derives its authority not from that independent right of Panitz to search on his own authority, but from his consent to the mandate of the warrant.

Certificate

James J. Duggan, Assistant District Attorney of Westchester County, appearing herein of Counsel to Honorable Carl A. Vergari, District Attorney of Westchester County,

New York, does hereby certify that the within petition is presented in good faith and not for delay, and he further certifies that this petition is restricted to the grounds above specified.

/s/ JAMES J. DUGGAN

Reasons for Granting the Petition

As was pointed out in the Statement in our Brief in opposition to the issuance of the writ (Respondent's Brief, pp. 3-4), the Court of Special Sessions of the City of Mount Vernon vacated the search warrant but withal sustained the search as being properly within the vice-principal's own authority. That determination was reversed in the Appellate Term of the Supreme Court on the theory that the student's right of access to the locker was exclusively his. The Court of Appeals, to which the district attorney appealed that ruling, said, first, that the school administration had the right to consent to the search of the locker, and second, that the vice-principal had an independent, affirmative obligation to search the locker if his investigation of reported possession of narcotics so indicated.

Thus, if *Bumper* is read to stand for the harshest rule possible, i.e., that non-consent is to be irrefutably presumed from the presentation to the supposed consenter of an invalid search warrant, a suggestion which Mr. Justice White rejected in *Bumper* v. *North Carolina, supra,* that only serves to annul one of the two grounds on which the Court of Appeals held this search permissible. That being so, as the Appellate Term on the remand from the Court of Appeals was not at liberty to disregard either of the criteria of the lawfulness of this search set down by the Court of Appeals (as a matter of fact, the Appellate Term never again reviewed that point in affirming the conviction here), so it will not now be at liberty on remand

from this Court to disregard the clear ruling of the Court of Appeals that Panitz had a right to search the locker which was altogether unrelated to the warrant.

In consequence of all this, and we mean this in no critical sense, this Court in remanding the case has given no meaningful advancement to the resolution of the central question it presents. The Appellate Term will almost surely re-affirm this conviction, and, considering the time and effort which he has already expended in this case, it is probably fair to say that the respondent will appeal such a ruling. Surely the People of the State of New York will appeal any other, and the matter will once again be placed before the New York Court of Appeals. There is no reason to anticipate that they will abandon that portion of their view of the case which is not governed by *Bumper,* and, having once recognized Dr. Panitz' unconditioned right to search the locker, they will no doubt reconfirm it. Hence in a year or two or three at most this Court will again be called upon to decide whether in fact that right exists as a proper adjunct to school administration. The Court is therefore earnestly requested to withdraw its vacatur of the judgment of the Appellate Term and its remand to that Court, and to order a full argument directed towards the dual question of whether Dr. Panitz had his own authority to search and of whether it may realistically be argued that a public official who is already under a duty to search is "compelled" further to do so by a defective search warrant.

If we examine first the proposition that Dr. Panitz had the right to search the locker whether he was shown a warrant or not, the Court's attention is respectfully directed to the scholarly opinion of the United States District Court for the Middle District of Alabama in *Moore* v. *Student Affairs Committee of Troy State University,* 284 F. Supp. 725 (1968). There, the Court has exhaustively treated and documented the relative rights and duties of a

modern university and a dormitory resident student. In that case, the Dean of Men at the University was called to a conference at the office of the Chief of Police of Troy, Alabama. This meeting was attended, along with the Dean and the Chief, by two narcotics agents and two students. It was suggested, with what reliability is unknown and for our present purposes may remain so, that marijuana would be found in a search of certain dormitory rooms. Acting upon this information, the Dean and the two narcotics men searched, among others, Moore's room and found marijuana. The District Court sustained the validity of the search as a proper exercise of the school's supervisory responsibility and said, at page 729:

> "A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a 'waiver' of that right as a condition precedent to admission. The college, on the other hand, has an 'affirmative obligation' to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student 'waives' his right to Fourth Amendment protection or on whether he has 'contracted' it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. In other words, if the regulation—or, in the absence of a regulation, the action of the college authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an 'educational atmosphere,' then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students."

We cannot argue that this case is not, at least superficially, distinguishable from the matter now before the Court. The first and most apparent distinction is that *Moore* involved disciplinary proceedings as opposed to criminal prosecution. The second is that *Moore* dealt with a resident college student as opposed to a nine-to-three high school boy, but the principle is nonetheless the same.

That, in fact, raises another point. *Moore* set down guidelines for students at the collegiate level, and this case was treated by the New York Court of Appeals as having special pertinency to high school pupils. There is, though, no substantial basis upon which to conclude that, at whatever level of scholastic achievement, new rights attach or old ones vanish. There is an old philosophical conundrum of how many stones make a pile. Regardless of the answer, the questioner asks whether, if one stone is removed, what remains is still a pile. This process is repeated stone by stone until the squirming victim is forced to say that what was a pile has become, by the removal of a single stone, less than a pile. Then comes the coup de grace; that last stone is placed back with the others and the "pile" is reconstituted. So it is with the student. It is all well and good to say that at the high school or college level certain standards apply, but those standards must be virtually identical because there is no sound basis of distinction between the high school senior and the college freshman. The same observation may be made of the progression from grammar school to high school. If in June a child is one thing, it is naive to think that in September he is going to be something else just because he has advanced one grade. Therefore, to turn this back to the point, the disciplinary prerogatives enjoyed by university administrators must be available in at least equal measure to administrators of primary and secondary schools. Perhaps they should even be available to such administrators in larger measure in view of the fact that students of these

schools are less mature and hence more greatly in need of supervision than are collegians, but certainly no responsible argument can be made that such officials are less entitled to utilize the necessary and approved tools of maintaining orderliness among large groups of children. Consequently, however the *Moore* case can be distinguished from this one, its underlying philosophy cannot be.

The Court's attention is also respectfully directed to *United States* v. *Donato,* 269 F. Supp. 921, 923 (E. D. Pa. 1967), affirmed 379 F. 2d 288 (3d Cir. 1967), cited by the *Moore* court. That case, though factually dissimilar to this one, poses a parallel problem and a reasonable answer which has obvious application to the instant case.

It is therefore submitted that Dr. Panitz possessed full authority of his own to search the locker, an authority he had made full use of before and was fully prepared to use again (Record, p. 93). In having omitted to rule on this point this Court has, it is submitted, relieved the New York State courts of any necessity of referring to *Bumper* v. *North Carolina, supra,* in deciding this case.

We would turn, then, to the second question we have suggested this Court ought to decide and that is, of course, the applicability of the *Bumper* rule to the situation where the person consenting to the search is a public official who is himself under an affirmative duty to search. It is submitted that in light of the decision of the New York Court of Appeals in this case and that of the District Court in *Moore* v. *Student Affairs Committee of Troy State University, supra,* it is unarguable that Dr. Panitz had the authority and the obligation to inspect school lockers, and even the respondent doesn't disagree with this (cf. Petition for Certiorari, p. 10). With a warrant, therefore, or without one, Panitz was required to search Overton's locker upon receiving information that narcotics were concealed there. Thus, one is entitled to wonder of what force

the warrant was, aside from communicating to Panitz the probability that a search would reveal such narcotics.

In the *Bumper* case, the person who consented to the search was, of course, Bumper's grandmother. Given the normal relationship between such people, it is obvious that she was attempting to protect him. Significantly, she believed a search was in his best interests, because she believed he was innocent, *Bumper* v. *North Carolina*, 20 L. Ed. 2d 797 at 802, n. 8. Differently stated, Mrs. Leath's primary, overriding concern was Mr. Bumper's well being. It simply is not to be credited that anything she did could be calculated to do him harm. Consequently, when the four police officers appeared with a search warrant, it is reasonable to suppose that her first inclination should have been to resist it, if not by force then at least by protesting against the search being conducted. At a matter of fact, the only consideration in *Bumper* which lends any authenticity to the State's claim that she consented is her belief in the boy's innocence. In no event, however, may it be argued that Mrs. Leath was in any sense required to assist the police except to the extent that she was commanded to do so by the warrant. Most assuredly she would not herself have conducted a search if the police had not done so. This Court ruled, and quite properly so, that this search was coerced.

The word "coerced" is defined in Webster's Third New International Dictionary, p. 439, col. 1, as:

> "1. to restrain, control or dominate, nullifying individual will or desire (as by force, power, violence or intimidation);
>
> 2. to compel to an act or choice by force, threat or other pressure;
>
> 3. to effect, bring about, establish or enforce by force, threat or pressure."

Assuredly all of these definitions apply to what occurred at the Leath home, because the unarticulated premise of all three is that, save for the restraint, control, domination, compulsion, etc., the ensuing act, i.e., the search, would never have taken place, and, as we have attempted to show, that is the fact.

But may the same conclusion be drawn from the events at Mount Vernon High School on December 21, 1964? It is submitted that it may not, for there the requirements of what we have called the unarticulated premise were not met, for undeniably the search would have taken place anyway. There was, therefore, no coercion as Webster's defines it. Whereas Mrs. Leath held paramount the safety of her grandson, Dr. Panitz' primary motivation was the discipline and good order of the whole school, and the security and health of the entire student body. To the extent to which Overton represented a threat to the school or the student body, any consideration due him as a student became secondary to Dr. Panitz' larger purpose. So, where Mrs. Leath may have been coerced into allowing a search, it is almost self-evident that Dr. Panitz was not, because no necessity for coercing him appears.

No question would have arisen in this case as to coercion if the detectives had simply come to Dr. Panitz and confided to him that they had information that narcotics were being secreted in Overton's locker. If he had then searched the locker, and who can doubt that he would have done just that, there would be no argument; it would have been an administrative search. Simply the fact of their having with them a search warrant, it is submitted, only beclouds an otherwise straightforward issue, and in effect it makes gossip and rumor more satisfactory gauges of reliability than the sworn affidavit which accompanied the warrant.

Finally, there is at least grave doubt that Dr. Panitz paid all that much attention to the warrant in searching the locker. It must be remembered that Overton admitted *in*

Panitz' presence that he had narcotics in his locker (Record, p. 47) and, as the Court pointed out in *Moore* v. *Student affairs Committee of Troy State University, supra,* page 728 n. 3, such an admission might well have constituted sufficient grounds to arrest him, citing *McCray* v. *Illinois,* 386 U. S. 1042, let alone encourage a conscientious school official to perform his duty and seize those narcotics.

CONCLUSION

For the foregoing reasons the Court should withdraw its vacatur of the judgment of the Appellate Term and direct a full argument.

Respectfully submitted,

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By: JAMES J. DUGGAN,
Assistant District Attorney,
Of Counsel.

November 12, 1968.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

OVERTON *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 212. Decided October 28, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Appellate Term of the Supreme Court of New York is vacated, and the case is remanded for further consideration in the light of *Bumper* v. *North Carolina*, 391 U. S. 543 (1968).

MR. JUSTICE BLACK dissents and would affirm the judgment of conviction here.